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Supreme Court, U.S.
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No. 96-1654

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANK J. MUSCARELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether a firearm that is transported in a vehicle must also be within the defendant's immediate reach in order to be "carried" within the meaning of 18 U.S.C. 924(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 106 F.3d 636. The opinions of the district court (Pet. App. 8a-11a, 12a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1997. The petition for a writ of certiorari was filed on April 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 25, 1995, petitioner entered a plea of guilty in the United States District Court for the Eastern District of Louisiana to one count of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846, one

count of distributing marijuana, in violation of 21 U.S.C. 841(a)(1), and one count of using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Before petitioner was sentenced, he moved to quash or dismiss the Section 924(c) count of the indictment, in light of this Court's decision in *Bailey* v. *United States*, 116 S. Ct. 501 (1995). The district court granted the motion (Pet. App. 8a-11a), and the court of appeals reversed. Pet. App. 1a-7a.

1. On May 25, 1995, petitioner entered a plea of guilty to, *inter alia*, using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). At the plea hearing, the government submitted a factual statement signed by petitioner. Gov't C.A. Br. 3. The statement established that, following negotiations with a cooperating individual (CI) and an undercover agent of the Drug Enforcement Administration (DEA), petitioner arranged for the delivery of a total of eight pounds of marijuana in two separate transactions. Both the negotiations and the payment for the marijuana took place in petitioner's Ford pick-up truck. In the first transaction, petitioner led the CI and the DEA agent to a location where marijuana had been left in a plastic bag at the side of the road. In a second transaction on the same day, petitioner again led the CI and the DEA agent to a certain location, and upon arrival, petitioner removed plastic bags containing marijuana from his vehicle. Following petitioner's arrest, a loaded firearm was found in the locked glove compartment of his truck. Gov't C.A. Br. 4-5; Pet. App. 8a. The signed factual statement asserted that this firearm was "knowing[ly] possessed in [petitioner's] vehicle and carried for protection in relation [to] the above

described drug trafficking offense." Gov't C.A. Br. 5. At the plea hearing, petitioner attested under oath to the accuracy of the written factual statement. *Id.* at 6.

2. a. On March 7, 1996, before petitioner was sentenced, he filed a motion in the district court pursuant to Federal Rule of Criminal Procedure 12(b)(2) to quash or dismiss the Section 924(c) count of the indictment. Petitioner argued that the charge was legally defective in light of this Court's decision in *Bailey*. The government opposed the motion on the ground that the factual statement established that petitioner had "carried" the firearm within the meaning of Section 924(c). Following a hearing, the district court granted the motion to dismiss. Pet. App. 8a-11a.

The court acknowledged that, in his signed factual statement, petitioner admitted that he knowingly possessed and carried the firearm in his vehicle for protection in relation to his drug trafficking offenses. Pet. App. 9a-10a. The court relied instead, however, on the following statement from the presentence investigation report:

> As to the weapon, [petitioner] does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office as a balif [*sic*] at the Courthouse in Amite.

Id. at 10a. The court accordingly concluded that:

> [petitioner] did not knowingly possess the firearm *in relation to* a drug-trafficking crime. To the

> contrary, [petitioner], his employment background considered, knowingly possessed the firearm in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction.

Ibid. The district court therefore granted petitioner's motion to dismiss the Section 924(c) count, although it did not rely on *Bailey* in doing so.

b. The district court denied the government's motion for reconsideration. Pet. App. 12a-13a. The court again acknowledged that petitioner had admitted carrying the gun for protection in relation to his drug trafficking, but the court noted that "this is a pre[-]*Bailey* composition by the government and a pre[-]*Bailey* consideration by [petitioner] and his counsel." *Id.* at 12a. Again citing the above-quoted language from the presentence report, the district court reaffirmed its conclusion that petitioner "did *carry* a firearm in the [locked] glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." *Id.* at 13a.

3. The court of appeals reversed in a per curiam decision. Pet. App. 1a-7a. The court first noted that, because *Bailey* did not address the "carrying" prong of Section 924(c), its prior "carrying" jurisprudence remained valid. *Id.* at 4a. Under the court's pre-*Bailey* decision in *United States* v. *Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), cert. denied, 504 U.S. 928 (1992), "the 'carrying' require-ment of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." Pet. App. 4a-5a.

The court held that the district court had erred in two respects: first, by discrediting as a "pre-*Bailey* composition" the factual statement in which petitioner had concurred, and second, by relying on petitioner's "post-conviction, self-serving declaration to the probation officer * * * regarding his subjective intent in possessing the pistol in the truck." Pet. App. 5a. Those errors, the court concluded, required reversal of the district court's decision. *Id.* at 6a-7a.

The court went on to reaffirm *Pineda-Ortuno*'s holding that "[w]hen a vehicle is used, 'carrying' takes on a different meaning from carrying on a person because the means of carrying is the vehicle itself." Pet. App. 6a. Thus, the court reasoned, "the fact that [petitioner's] glove compartment was locked does not prevent conviction." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-11) that this Court should grant review to resolve the conflict in the circuits on the question whether a conviction under Section 924(c) for "carrying" a firearm in a vehicle requires proof that the firearm was immediately accessible to the defendant. The court of appeals in this case correctly held that immediate accessibility is not required, and the conflict identified by petitioner does not warrant further review at this time.

1. a. Because Section 924(c) does not define "carry," the term must be interpreted "in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (analyzing "use" prong of Section 924(c)). The court of appeals in this case correctly determined that "carry[ing]" refers simply to the act of transporting an object, and that its plain

meaning does not include the limitation that the carried object be "immediately accessible." See Pet. App. 4a-5a.

The primary definition of "carry" supplied by *Webster's Third New International Dictionary* 343 (1976) (emphasis added) is:

> to move while supporting (*as in a vehicle* or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place.

Indeed, the word "carry" derives from the French "carier," which means "to transport in a vehicle." See *ibid.* The dictionary employed by this Court in *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995), and *Smith* offers an even more expansive definition of "carry":

> To convey, or transport, while supporting, originally in a cart or car, hence in any manner; to bear; to transfer; to transmit, to take.

Webster's New International Dictionary of the English Language 412 (2d ed. 1958). In short, to carry an object means to transport it. Although it is frequently true that a carried object is immediately accessible, the ordinary meaning of the verb does not necessarily require that element.

As the Fifth Circuit has cogently explained in a case involving the carrying of a firearm in a vehicle:

> Those cases * * * that would seem to suggest that for there to be a "carrying" the weapons must be located within such proximity so as to make them immediately available for use are distinguishable. The cases requiring "easy reach" are the result of judicial expansions of the definition of "carrying" in a nonvehicle context. When a vehicle is used, "carrying" takes on a different meaning from carrying on the person because the means of carrying is the vehicle itself.

United States v. *Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), (citations omitted), cert. denied, 504 U.S. 928 (1992). Several other circuits agree that "when a motor vehicle is used, 'carrying a weapon' takes on a less restrictive meaning than carrying on the person. The means of carrying is the vehicle, itself, rather than the defendant's hands or pocket." *United States* v. *Cardenas*, 864 F.2d 1528, 1535-1536 (10th Cir.), cert. denied, 491 U.S. 909 (1989); accord *United States* v. *Freisinger*, 937 F.2d 383, 387 & n.4 (8th Cir. 1991) (agreeing with *Cardenas* reasoning and affirming Section 924(c) conviction where firearms found in passenger compartment of car); *United States* v. *Farris*, 77 F.3d 391, 395 (11th Cir.) (same), cert. denied, 117 S. Ct. 241 (1996).

Petitioner's reliance (Pet. 14) on the definition of the specific phrase "to carry arms or weapons," is misplaced.[1] First, Section 924(c) does not use that precise language. Second, that definition would restrict "carrying" to situations in which the firearm is physically worn on the defendant's person or in his clothing. As the First Circuit has recognized, no court has held that the term "carry" is so limited. *United States* v. *Cleveland*, 106 F.3d 1056, 1067 (1997), petition for cert. pending, No. 96-8837. Instead, every circuit to consider the question has recognized that a firearm may be "carried" in a vehicle. And as the

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[1] *Black's Law Dictionary* defines that phrase to mean: "To wear, bear, or carry them upon the person or in the clothing or in a pocket." *Black's Law Dictionary* 214 (6th ed. 1990).

above-cited definitions demonstrate, such a "carrying" takes place whenever a firearm is transported; the element of immediate accessibility plays no part in the ordinary definition of "carry."[2]

b. Contrary to petitioner's assertion (Pet. 13-14), the court of appeals' interpretation of "carrying" does not conflict with the reasoning in *Bailey*. *Bailey* concerned only the "use" prong of Section 924(c). To the extent that *Bailey* addressed the meaning of the term "carry," the Court simply made clear that "carry" had a meaning independent of "use," because Congress intended each prong of Section 924(c) "to have a particular, nonsuperfluous meaning." 116 S. Ct. at 507. Thus, the Court explained, under the "active employment" definition it adopted,

> a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Ibid.

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[2] The location of the firearm in a vehicle and its accessibility to the defendant may be relevant in assessing whether the firearm was carried "in relation to" the drug crime. See *Cleveland*, 106 F.3d at 1067; *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.) ("[t]o establish th[e] nexus" required by the "during and in relation to" element of Section 924(c)(1), court may consider accessibility of firearm to defendant and proximity of firearm to drugs), cert. denied, 117 S. Ct. 443 (1996). But the accessibility of the firearm in the vehicle has nothing to do with whether the firearm is carried from one place to another when the defendant moves the vehicle.

The decision of the court of appeals does not contravene that aspect of *Bailey*. Under the court of appeals' interpretation, "carrying" still encompasses a great many scenarios that are not also "uses." For example, the defendant who places a firearm in his vehicle, then drives to another location where he consummates a drug deal in or near his car, has not "actively employed" (*i.e.*, "used") the firearm, but he has carried it. See *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.) (rejecting requirement of ready access for "carrying," and noting that, under that interpretation, "the 'carry' prong applies in a great many situations in which the post-*Bailey* definition of the 'use' prong would not"), cert. denied, 117 S. Ct. 443 (1996).

Bailey also held that the term "use" in Section 924(c) "must connote more than mere possession of a firearm by a person who commits a drug offense," because if Congress had meant to punish mere possession, it could have so provided. 116 S. Ct. at 506. Contrary to petitioner's contention (Pet. 12-13), the decision of the court of appeals does not expand the "carry" prong to reach all acts of possession, because a defendant who carries a firearm in a vehicle has done more than passively possess it, regardless of whether he has immediate access to it.[3] The defend-

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[3] The Fifth Circuit's definition of "carrying" plainly includes the element of transportation. See *United States* v. *Fike*, 82 F.3d 1315, 1328. ("In placing a gun under the driver's seat of a car, then driving the car to another location, one has carried the gun."), cert. denied, 117 S. Ct. 241 (1996); *United States* v. *Speer*, 30 F.3d 605, 612 ("The 'carrying' requirement of Section 924(c) is met where a defendant operates a vehicle knowing the firearm is in the car."), cert. denied, 513 U.S. 1028 (1994); *Pineda-Ortuno*, 952 F.2d at 104 (endorsing plain

ant has, by definition, transported or conveyed the firearm; he has "move[d] [the firearm] an appreciable distance without dragging" it, and has "br[ought] [it] along to another place," in connection with a drug trafficking offense. *Webster's Third New International Dictionary* 343 (1976).[4]

2. In the wake of *Bailey*, five circuits have agreed that a defendant who transports a firearm in a vehicle has "carried" the firearm, regardless of the weapon's accessibility. Those courts hold that vehicular "carrying" under Section 924(c) requires only two elements: "It is the *possession* of the firearm coupled with the *affirmative act of transporting it* during and in relation to a drug trafficking crime–that precipitates liability under § 924(c)(1)." *United States* v. *Molina*, 102 F.3d 928, 930 (7th Cir. 1996) (citation omitted; emphasis added)[5]; see also *United States* v.

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and ordinary definition of "carry," which includes transportation or movement).

[4] Petitioner argues implicitly that the element of immediate accessibility will somehow distinguish "carrying" a firearm from mere possession of the firearm. That reasoning turns *Bailey* on its head. In *Bailey*, the Court expressly rejected the claim that the placement of a weapon, or its "proximity and accessibility," standing alone, "amounted to something more than mere possession." 116 S. Ct. at 506. In the same vein, proximity and accessibility cannot be what distinguishes mere storage of a weapon in a vehicle from the carrying of that weapon. Instead, as the court of appeals correctly concluded, a weapon is "carried," within the plain and ordinary meaning of that term, whenever it is transported in a vehicle, regardless of its accessibility to the defendant. The active element of transportation is what distinguishes "carrying" from mere possession.

[5] Despite the "recent and very clear" holding of *Molina* (*United States* v. *Cooke*, 110 F.3d 1288, 1302 (7th Cir. 1997)

Mitchell, 104 F.3d 649, 653 (4th Cir. 1997) ("the plain meaning of the term 'carry' * * * requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner"); *Miller*, 84 F.3d at 1259 ("the government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so"); *United States* v. *Rivas*, 85 F.3d 193, 195 (5th Cir.) ("the 'carrying' requirement of § 924(c) is met 'if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime'" (quoting *Pineda-Ortuno*, 952 F.2d at 104)), cert. denied, 117 S. Ct. 593 (1996); *Cleveland*, 106 F.3d at 1066-1067 ("the concept of whether or not the carried item is within reach plays no part in the definition" of "carry"). These courts have uniformly reasoned that the plain meaning of "carry" does not, in the vehicular context, include the limitation of immediate accessibility and that nothing in *Bailey* requires such a limitation.[6]

(Coffey, J., concurring)), a subsequent panel of the Seventh Circuit has inexplicably asserted that it remains an open question whether immediate accessibility is an element of "carrying." *Id.* at 1298. The discussion of the issue in *Cooke* was itself dicta, however. See *id.* at 1297.

[6] In addition, decisions from several other courts suggest that they may follow suit when the issue of firearm-accessibility in a vehicle is squarely presented. See, *e.g.*, *Farris*, 77 F.3d at 395 (holding that jury could find weapon in glove compartment "carried" where vehicle used as drug distribution center and defendant "knew the firearm was in the automobile"); *United States* v. *Barry*, 98 F.3d 373, 377 (8th Cir. 1996) (affirming "carry" conviction where gun found in glove compartment; "*Bailey* does not require us to abandon" holding that "the common usage of 'carries' include[s] 'carries in a vehicle'"),

The Second, Sixth, and Ninth Circuits, on the other hand, have held that a weapon must be immediately available to the defendant in order to be carried. It remains to be seen, however, whether those courts will adhere to that view in the face of the growing weight of contrary authority. On June 12, 1997, the Sixth Circuit granted the government's suggestion for rehearing en banc of *United States* v. *Malcuit*, 104 F.3d 880 (1997). See App., *infra*, 1a-2a. And the Ninth Circuit also appears to be giving serious consideration to rehearing the issue presented here. The government has filed a suggestion for rehearing en banc of *United States* v. *Foster*, 96 F.3d 1177 (9th Cir. 1996) (withdrawn). The court of appeals has withdrawn its opinion in that case, and recently requested a supplemental brief from the government on the issue of the need for en banc review to reconcile the Ninth Circuit's own precedents.[7] Although the Second Circuit recently denied the government's suggestion for rehearing en banc of *United States* v. *Cruz-Rojas*, 101 F.3d 283 (1996), that court might be inclined to reconsider its views if the Ninth Circuit were to join the Sixth in granting rehearing. Because there is a

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cert. denied, 117 S. Ct. 1014 (1997); *Freisinger*, 937 F.2d at 387-388 & n.4 (finding defendant "carried" firearms found in knotted pillowcase inside plastic bag on floor of vehicle).

[7] In *United States* v. *Barber*, 594 F.2d 1242, cert. denied, 444 U.S. 835 (1979), a pre-*Bailey* case, the Ninth Circuit squarely rejected the contention that "the word 'carries,' as used in [Section 924(c)], connotes only the concept of bearing the weapon upon one's person or having the gun within his immediate control." *Id.* at 1244. The *Barber* court affirmed the conviction of a defendant who was carrying a firearm in the locked glove compartment of his car during a drug offense. *Id.* at 1243.

reasonable possibility that the courts of appeals will themselves eliminate the conflict of authority, we believe that review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-3794

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS A. MALCUIT, DEFENDANT-APPELLANT

[Filed: June 12, 1997]

ORDER

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE and COLE, Circuit Judges.

It now appearing that the requisite number of judges in regular active service have voted for rehearing en banc; it is **ORDERED** that the order of June 9, 1997 is hereby withdrawn; it is further **ORDERED**, as provided in Sixth Circuit Rule 14, that the previous decision and judgment of this court are vacated, the mandate is stayed and the case is restored to the docket as a pending appeal.

It is further **ORDERED** that the appellant file a supplemental brief not later than Friday, August 22,

1997, and the appellee file a supplemental brief not later than Monday, September 22, 1997. The Clerk will schedule this case for argument as directed by the court.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk